

1947

Criminal Liability of a Business Man for Conduct of His Employees

Peter A. Dammann

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Peter A. Dammann, Criminal Liability of a Business Man for Conduct of His Employees, 38 J. Crim. L. & Criminology 132 (1947-1948)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

Robert S. Morris, *Criminal Law Editor*

Criminal Liability of a Business Man for Conduct of His Employees

In *Ex parte Marley*¹ a clerk in a butcher shop short-weighted a customer in the sale of one veal steak and four or five lamb chops. The clerk was fined \$100, while his employer, who was absent at the time of sale and who allegedly did not know of and had not authorized the transaction, was sentenced to 90 days in jail.² Discharging a writ of habeas corpus,³ the Supreme Court of California denied that the conviction was a deprivation of due process⁴ and held that the case fell within a recognized class of police offenses for which no proof of intent or guilty knowledge is required.

As a general rule, the principal is not criminally liable for the acts of his servant or agent unless he authorizes or aids and abets the commission of a crime. The doctrine of respondeat superior does not apply to criminal law.⁵

But the legislature, in the exercise of its police power, may define as crimes certain acts irrespective of the defendant's personal participation or of his guilty knowledge.⁶ Since about the middle of the nineteenth century, legislatures and courts have recognized an ever increasing group

1 Cal. (2d), 175 P. (2d) 842 (1946).

2 Cal. Business and Professions Code (Deering 1944) §12023: "Every person who by himself or his employee or agent, or as the employee or agent of another, sells any commodity, at, by, or according to gross weight or measure, or at, by, as of, or according to any weight, measure or count which is greater than the true net weight . . . is guilty of a misdemeanor."

Misdemeanors in California, except where otherwise provided by law, are punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding \$500, or both. Cal. Penal Code (Deering 1941) §19.

3 On a petition for a writ of *habeas corpus*, the California Supreme Court within its discretion may review the constitutionality and proper construction of criminal statutes. Cal. Const. Art. VI, § 4; Cal. Penal Code (Deering 1941) §1473, and (Deering Supp. 1945) §1475.

4 Cal. Const. Art. 1, §13.

5 *United States v. Food & Grocery Bureau of So. Cal.* 43 Fed. Supp. 966, (S. D. Cal., 1942); *People v. Green* 22 Cal. App. 45, 133 Pac. 334 (1913); *People v. Doble* 203 Cal. 510, 265 Pac. 184 (1928); *Commonwealth v. Stevens* 155 Mass. 291, 29 N. E. 508 (1892); *Lovelace v. State* 191 Miss. 62, 2 So. (2d) 797 (1941); *State v. Burns* 215 Minn. 182, 9 N.W. (2d) 518 (1943).

6 "The prosecution to which (defendant) was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the *conventional* requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in *responsible relation to a public danger*." (Italics supplied.) *Frankfurter, J. in United States v. Dotterweich* 320 U. S. 277, 280 (1943).

But for offenses involving jail sentences would not the "clear and present danger" test of the freedom of speech cases be preferable? *Schenck v. United States* 249 U. S. 668 (1896); *Bridges v. California* 314 U. S. 252 (1941). Or is a jail sentence a lesser deprivation of liberty than a denial of free speech?

of offenses punishable without regard to any mental element. It has been said that the simultaneous but independent growth of "public welfare offenses" in Great Britain and the United States represents the impact on the law of the rapid technological and economic changes of the nineteenth and twentieth centuries and the consequent shift of emphasis from the individual to the social welfare.⁷ Various statutes, enacted during the past hundred years to protect the public from specific abuses, throw upon the principal the risk of criminal liability arising from the mere existence of an agency or employment relationship.⁸ These statutes have even been construed as denying to the defendant the defenses of ignorance or mistake of either or both principal and agent.⁹ In holding the principal accountable for the conduct of his agent, courts have expressly recognized the need for regulation, the difficulty of enforcement if a defendant were permitted to plead lack of intent, the danger that an employer might shift responsibility to his employees, and the probability that a principal could prevent most infractions by his agents.¹⁰

Criminal responsibility of the principal usually turns on the construction of the statute. Sometimes the legislature specifically provides that a statute shall apply to the principal and that intent is not a necessary

⁷ See Sayer, *Public Welfare Offenses* (1933) 33 Col. L. Rev. 55, for an analysis of the history of these cases. The imposition of absolute criminal liability appears to have originated in the public nuisance cases. *Rex v. Medley* 6 Car. & P. 290, 172 Eng. Reprint 1246 (1834) (director of gas company convicted for contamination of Thames River although ignorant of the offense); *Regina v. Stephens* L. R. 1 Q. B. 702 (1866) (aged owner of slate quarry convicted of nuisance because his men permitted rubbish to fall into river; proceedings, although criminal in form, were termed essentially civil in nature; hence, no *mens rea* necessary.) See *Commonwealth v. N. Y. Central & H. R. R. Co.* 202 Mass. 394, 395, 88 N. E. 764, 765 (1909) (obstructing highway punishable by common law as well as by statute); *State v. Pennsylvania R. Co.* 84 N. J. L. 550, 87 Atl. 86 (1913) (locomotives' emitting of smokes and smells indictable as a public nuisance).

⁸ *Carolene Products Co. v. United States* 140 F. (2d) 61 (C.C.A. 4th, 1944) (sale of filled milk); *Great Atlantic & Pacific Tea Co. v. District of Columbia* 89 F. (2d) 502 (App. D. C., 1937) (short weight by unidentified employee); *Ex parte Casper* 69 Cal. App. (2d) 441, 159 P. (2d) 96 (1945) (sale of inedible eggs by defendant's partner); *Meigs v. State* 94 Fla. 809, 114 So. 448 (1927) (employees packed for shipment fish under statutory length); *Lunsford v. State* 34 S. E. (2d) 731 (Ga. App. 1945) (partner violated statute providing that no professional bondsman after becoming surety on a criminal bond should thereafter receive any sum in the case); *New Orleans v. Vinci* 153 La. 528, 96 So. 110 (1922) (having in possession milk below standard); *People v. Thompson & Potter* 289 N. Y. 259, 45 N. E. (2d) 432 (1942) (having in possession for sale oysters not registered with New York City Department of Health); *State v. Weisberg* 74 Ohio App. 91, 55 N. E. (2d) 870 (1943) (short weight); *City of Spokane v. Patterson* 46 Wash. 93, 89 Pac. 492 (1907) (blasting with dynamite in unsafe manner). Cf. *Goldsmith, Jr. v. Grant Co. v. United States* 254 U. S. 505 (1921) (auto owned by defendant on conditional sale contract used by purchaser for transporting liquor; auto forfeited); *Feeley v. City of Melrose* 205 Mass. 329, 91 N. E. 306 (1910) (plaintiffs denied recovery for personal injuries received while unknowingly being driven in unregistered auto).

⁹ *Commonwealth v. Jackson* 345 Pa. 456, 28 A. (2d) 894 (1942) (defendant's dairymaid sold milk ten cents below minimum price).

¹⁰ *Great Atlantic & Pacific Tea Co. v. District of Columbia* 89 F. (2d) 502 (App. D. C., 1937). The opinion set out without comment testimony of the manager of the local chain store that the meat department was inventoried every Saturday night and that the manager was held accountable for every pound of meat. The implication would appear to be that employers who impose such pressure on their employees will not be heard to complain if held accountable for the employees' misconduct. But why not infer intent in such a situation?

ingredient of the crime; but more often legislation is ambiguous.¹¹ To determine legislative intent the court must then look to the overall purposes of the statute, its legislative history, and the seriousness of the offense.¹² Some cases stress the distinction between acts *malum in se* and those *malum prohibitum*¹³ and suggest that criminal intent and guilty knowledge are still essential elements of crimes involving moral turpitude.¹⁴ But although most cases involve minor offenses with small penalties, the courts have sustained heavy sentences for serious misdemeanors and even felonies where the defendant was not allowed to plead lack of participation or guilty knowledge.¹⁵

Judicial recognition of a doctrine of vicarious criminal liability may be in part a result of a faulty classification of the cases and a failure to analyse the different meanings of such words as "criminal intent" and "guilty knowledge." The Massachusetts court, for example, has cited cases sustaining convictions for adultery, where the defendant did not know that his paramour was married, for the proposition that a principal can be punished for the conduct of his employees.¹⁶ Most courts have failed to recognize a distinction between the question of whether a defendant should be punished for his own acts, in the absence of a showing of criminal intent, and whether he should be punished for another's

¹¹ Commonwealth v. Sacks 214 Mass. 72, 100 N. E. 1019 (1913) involved a typical statute which provided that "whoever, himself or by his agent" etc. is guilty. Mass. Stat. (1907) c. 394 §1. Also see the California statute in *Ex parte Marley* set out in note 2 *supra*. State v. Weisberg 74 Ohio App. 91, 55 N. E. (2d) 870 (1943) is typical of a number of cases where principals have been convicted even though the statute makes no reference to servants or agents. The absence of words such as "knowingly" or "wilfully" is usually held to indicate the legislative intent that proof of intent should not be required, and such statutes usually are construed as making the principal accountable for the conduct of his agents. *But cf.* State v. Pinto 129 N. J. L. 255, 29 A. (2d) 180 (1942) which reversed a conviction of a principal because even though intent is not required "the unlawful act must be brought home to the defendant."

¹² See the dictum of Atkin, J. in *Moussell Bros. Ltd. v. London & North-Western Railway Co.* 2 K. B. 836 (1917). *Smith v. State* 231 Ala. 346, 136 So. 270 (1931).

¹³ "Strictly *malum prohibitum* offenses created under the exercise of the police power do not require intent and purpose on the part of the accused violator to disregard them, unless the statute should so require." *Duncan v. Commonwealth* 239 Ky. 231, 158 S. W. (2d) 396 (1942). *People v. Boxer* 24 N. Y. S. (2d) 628 (1940). But violations of the Anti-Narcotic Act were impliedly held to be *malum prohibitum* by Taft, C. J. in *United States v. Balint*, 258 U. S. 250 (1922). The distinction between offenses *malum in se* and those *malum prohibitum* is generally discredited and would seem to possess little validity.

¹⁴ This would appear to be the basis of the opinion in *State v. Pansey* 61 Nev. 330, 130 P. (2d) 264 (1942), holding that the legislature could not lawfully making it a crime to receive or buy stolen goods without regard to guilty knowledge, criminal intent, or criminal negligence.

¹⁵ *State v. Lindberg* 125 Wash. 51, 215 P. 41 (1923) (statute made it a felony for a bank director to borrow from his own bank unless authorized by a special resolution of the board of directors; defendant not permitted to prove that he did not know that money loaned to him by an agent came from his own bank; indeterminate sentence of one to five years held not a deprivation of due process nor an infliction of a cruel and unusual punishment). *Cf.* *Commonwealth v. Mixer* 207 Mass. 140, 93 N. E. 249 (1910) (driver for a common carrier convicted for transporting liquor in violation of statute requiring seller or consignor to mark package in designated manner; fact that employee could not reasonably know that the package, a sugar barrel, contained liquor held immaterial since no intent was required by statute. See also *United States v. Greenbaum* 138 F. (2d) 437 (C.C.A. 3d, 1943).

¹⁶ *Commonwealth v. Sacks* 215 Mass. 72, 100 N. E. 1019 (1913); *Commonwealth v. Mixer* 207 Mass. 140, 93 N. E. 249 (1910).

conduct. Some of the precedents for the imposition of criminal liability on the principal involve fact situations where criminal intent and guilty knowledge might well have been inferred and where, therefore, there was no necessity for holding that these traditional requirements of criminal law could be dispensed with.¹⁷

Although both state and federal courts have gone far to uphold the discretion of the legislature in defining offenses and designating the penalties, it would seem that the Constitution compels some limitation to the imposition of criminal liability on the principal for the conduct of his agent. In the two states in which the question has arisen, statutes abrogating the defense of insanity in criminal trials have been invalidated on the grounds that due process of law requires that a jury shall be permitted to pass on the defendant's sanity as a substantive fact going to his guilt or innocence.¹⁸ One of the opinions distinguished the statutory offense cases on the grounds that a principal is a "free moral agent;"¹⁹ but it might well be inquired to what extent he is free in the selection and control of his employees.²⁰

Precedents in the related field of statutory presumptions would appear to present a forceful constitutional argument. In creating presumptions legislatures have been motivated by the same considerations of convenience in enforcement which the courts stress so heavily in the statutory offense cases. Yet the Supreme Court has not hesitated to invalidate such presumptions as a denial of due process if they subjected the accused to "hardship or oppression."²¹ A jurist might draw a nice dis-

17 *Commonwealth v. Smith* 166 Mass. 370, 44 N. E. 503 (1896) (defendant convicted for the statutory offense of being present when gaming implements were found); *Commonwealth v. Kane* 173 Mass. 477, 53 N. E. 919 (1899) (defendant convicted of being found present at a place where implements for smoking opium and preparations of opium were found).

18 *Sinclair v. State* 161 Miss. 142, 132 So. 581 (1931); *State v. Strasburg* 69 Wash. 106, 110 P. 1020 (1910). The opinions were based on the due process clauses and other provisions of the state constitutions.

19 *Rudkin, C. J. concurring in State v. Strasburg*, 69 Wash. 106, 110 P. 1020 (1910).

20 "There is nothing an employer can do to protect himself, as the act of the employee is one which depends entirely upon use of his own faculties and senses and it is impossible for the employer to determine with any degree of accuracy whether the faculties and senses of the employee are functioning properly and accurately during all his working hours." *Carter, J. dissenting in Ex parte Marley* 175 P. (2d) 832, 836.

21 "... Within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balance of convenience or of opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." *Cardozo, J. in Morrison v. California*, 291 U. S. 82, 88, 89 (1934) invalidating as a denial of the due process clause of the Fourteenth Amendment a provision of the Alien Land Law, Cal. Stat. (1927), 880, c. 528 which placed the burden on defendant to prove that he was a citizen or eligible to become a citizen of the United States.

Tot v. United States 319 U. S. 463 (1943) invalidated as a violation of the due process clause of the Fifth Amendment a presumption created by the Federal Firearms Act 52 Stat. 1250, 1251 (1938) 15 U. S. C. A. § 902 (f) (1939): "A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two." *Roberts, J.* 319 U. S. 463, 467. *Accord: Bailey v. Alabama* 219 U. S. 219 (1911); *Manley v. Georgia* 279 U. S. 1 (1929). *See Bollenbach v. United States* 326 U. S. 607, 611 (1945).